Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1391

GLORIA DELESDERNIER, WIFE OF
PAUL MARCHAND
Petitioner

versus

ESTATE OF JULIA LOGA, WIFE OF
GEORGE W. DELESDERNIER, ET AL. and
DELESDERNIER ESTATES, INC.
Respondent

La Ct App, 4th Cir

PETITION FOR A WRIT OF CERTIORARI TO
THE TWENTY-FIFTH JUDICIAL DISTRICT
COURT, PARISH OF PLAQUEMINES,
STATE OF LOUISIANA

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GLORIA DELESDERNIER, WIFE OF
PAUL MARCHAND

Petitioner

v.

ESTATE OF JULIA LOGA, WIFE OF GEORGE W. DELESDERNIER, ET AL. and DELESDERNIER ESTATES, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TWENTY-FIFTH JUDICIAL DISTRICT COURT, PARISH OF PLAQUEMINES, STATE OF LOUISIANA

The petitioner, Gloria Delesdernier, prays that a writ of certiorari issue to review the record and the judgment of the Twenty-Fifth Judicial District Court, Parish of Plaquemines, State of Louisiana rendered in these proceedings on September 9, 1976.

OPINIONS BELOW

The denial of the application for certiorari or writ of review of the Supreme Court of Louisiana, as yet unreported, appears in the appendix hereto, *infra*, p. A-19. The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana is reported at 354 So2d 576 (La App 1977), and appears in

the appendix hereto, *infra*, pp. A-10-18 . The judgment of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, with not reasons therefore, is unreported, and appears in the appendix hereto, *infra*, pp. A1-9 .

JURISDICTION

The refusal of certiorari by the Supreme Court of Louisiana was entered on February 17, 1978. It is final. The federal question raised is indicated at pp. 2-3 , *infra*. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether the 14th Amendment to the United States Constitution, U.S.C. Const. Amend. 14 § 1, requires that a litigant be afforded notice and an opportunity to be heard, prior to rendition of a judgment against her?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

"* * * *nor shall any state deprive any person of life, liberty, or property, without due process of law;* * * *"

STATEMENT OF THE CASE

Without any notice being given and without a hearing in the trial court, valuable claims of plaintiff's consolidated suits were dismissed on September 9, 1976, for failing to allege a cause or right of action; although the Court of Appeals, Fourth Circuit, had held on March 7, 1966, that her petition laid a cause of action in simulation for these claims. *Succession to Delesdernier,* 184 So2d 37 (4th Cir 1966).

Plaintiff appealed assigning as error that the case had never been noticed for hearing, that there had been no hearing, and to afford due process of law, the case should be remanded for a hearing. Alternatively, plaintiff assigned other errors.

The Court of Appeals, Fourth Circuit, did not even comment upon plaintiff's only assignment of error raised upon the appeal; i.e., that there had been no notice and no hearing; and that court affirmed the dismissal of plaintiff's suit in the trial court, even though the trial court's record clearly shows that there was no notice and no hearing.

REASONS FOR GRANTING THE WRIT

It is common to equate the adversary system with the idea of due process. As Justice Frankfurter argued in *Joint Anti-Fascit Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951).

> "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

Through the various stages of appeal, the sway of this case has been that, even if there was no notice nor hearing, the trial court decided the case correctly; therefore, no harm was

done. Seneca, the Roman playwright and philosopher, raised the point:

> "He who has judged aught, with the other side unheard, may have judged righteously, but was himself unrighteous". *Medea*, in SENECA'S TRAGEDIES 247 (F. Miller transl. 1938).

Long ago this Court decided, in *Cox v. Armor Fertilizer Works*, 237 U.S. 413 (1915), that to one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense anyway.

Had petitioner robbed, raped, murdered, or even gotten a parking ticket and been sentenced to pay a fine without notice nor a hearing, her case clearly would have been overturned. Here, she has lost a valuable property right, recognized in 1966 by the very same court, which in 1978 refuses to even comment upon the fact that the right was taken from her without procedural due process.

Due process requires notice in any proceeding with an opportunity to appear and be heard before a valid judgment may be entered. *Hanley v. Four Corners Vacation Properties, Inc.*, 480 F2d 536 (C.A.Colo. 1973).

In recent years, expansion of the scope of property interests protected by the due process clause has succeeded in making hearings available in some form in a wide variety of cases. What were once thought to be privileges conferred by the state, or charity distributed by it, are now understood to

be entitlements that can be revoked only through procedures in which the recipient may contest the threatened deprivation. Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L. J. 89.

Diverse forms of "property" interests, such as diver's licenses, *Bell v. Burson*, 402 U.S. 535 (1971), welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970), tenure at state colleges, *Perry v. Sindermann*, 408 U.S. 593 (1972), and tenancy in public housing, *Escalera v. N.Y. City Housing Authority*, 425 F.2d 853 (2nd Cir 1970) cert. den. 400 U.S. 853 (1970), are now entitled to due process safeguards.

The case at bar requires no strained construction of property interest or entitlements. It presents a straight forward question of whether or not petitioner is entitled to a hearing before a judge can throw out her rights.

Had there been a hearing in the trial court, it would have been advised that over ten years prior the Court of Appeal, Fourth Circuit, had held that petitioner's allegations stated a cause of action in simmulation. The fact that the Court of Appeal, Fourth Circuit, fell into error[1] by not following its own law of the case is of no moment for petitioner was still denied her right to be heard in the trial court.

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1. In *Donald v. Glazer*, 220 So2d 84 (1968), the Supreme Court of Louisiana held, as a matter of State Constitutional law, La. Const. Art 7, §11 [Now Art. 5, §5], that matters adjudicated on the first appeal or not amendable to further review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Twenty-Fifth Judicial District Court, Parish of Plaquemines, State of Louisiana.

Respectfully Submitted,

E. Howard McCaleb, III
536 First N. B. C. Building
New Orleans, Louisiana 70112
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March,1978, three copies of the Petition for writ of Certiorari were mailed, postage prepaid, to Ernest A. Carrere, Jr., Esq., 225 Baronne Street, 28th Floor, New Orleans, Louisiana 70112, Counsel for the Respondents. I further certify that all parties required to be served have been served.

E. Howard McCaleb, III
536 First N.B.C. Building
New Orleans, Louisiana 70112
Counsel for Petitioner

APPENDIX A

JUDGMENT ON EXCEPTIONS

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA

GLORIA DELESDERNIER, Wife Of
PAUL MARCHAND, ET AL
v. NUMBER 4665
ESTATE OF JULIA LOGA, Wife Of
GEORGE M. DELESDERNIER, ET AL
and DELESDERNIER ESTATES, INC.

CONSOLIDATED WITH
SUCCESSION OF GEORGE W.
DELESDERNIER NUMBER 3005

CONSOLIDATED WITH
SUCCESSION OF MRS. JULIA
THERESA LOGA, Wife of GEORGE
W. DELESDERNIER NUMBER 1043

FILED: Sep 9 1976 s/ C. R. FONTENELLE
DEPUTY CLERK

JUDGMENT ON EXCEPTIONS

This matter came for hearing on May 11, 1976, and July 9, 1976, on exceptions of no right and no cause of action, res judicata and prescription filed on behalf of Mark Delesdernier.

Present: E. HOWARD McCALEB, III
Attorney for Gloria Delesdernier
Marchand Gerald, Plaintiff

KING F. NUNGESSER
Attorney for Angie Neider Delesdernier

ERNEST A. CARRERE, JR. and
LUCIUS F. SUTHON of
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
Attorneys for Mark Delesdernier, Defendant

JOSEPH W. NELKIN
Attorney for Paul Delesdernier, Succession
of Ira Delesdernier, Sr. and Gael Keene
Ralph, assignee of Beulah Delesdernier
Keene, Defendants
(Not present at July 9, 1976 hearing)

Not present and not represented but to whom notice of hearing duly given:

Shirley Delesdernier, deceased (defendant and plaintiff), wife of/and Charles C. Koehl, third party defendant (represented by Charles D. Lancaster, deceased).

The petition as supplemented and amended of Gloria Delesdernier (wife of Paul Marchand at the time of filing, and now wife of Clay Nelson Gerald) contained, inter alia, certain basic claims:

1) That the Acts of Sale for Items 8, 14 and 15 sold by the Succession of Robert M. White, which named Mark Delesdernier alone as the purchaser as to Item 8, and Mark Delesdernier, Shirley Delesdernier and George O. Delesdernier, as the purchasers as to Items 14 and 15, were "simulated transfers" from George W. Delesdernier and/or the community of acquets and gains between Julia Loga, wife of/and George W. Delesdernier.

2) That the Judgments of Possession in the Succession of Mrs. Julia Thereas Loga, Wife of George W. Delesdernier No. 1043 of this Court, signed on September 26, 1934 and on November 7, 1934, should be declared to be nullities and set aside.

3) That the properties included in two certain tax sales from Robert M. White to Mark Delesdernier in the year 1931, recorded in Plaquemines Parish in COB 71, page 411, and in COB 71, page 415, should be deemed to belong to the Successions of Julia Loga Delesdernier and George W. Delesdernier.

4) That plaintiff is entitled to recover damages in the sum of $1,000,000.

After hearing the pleadings, evidence, memoranda and argument of counsel, the Court, considering the law and evidence to be in favor of defendant-exceptor, Mark Delesdernier, and against the plaintiff, Gloria Delesdernier Marchand Gerald, and the Court considering the exceptions applicable for or against all parties to the litigation as their respective interest may appear;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant-exceptor, Mark Delesdernier, and against the plaintiff, Gloria Delesdernier Marchand Gerald, maintaining the exceptions of no right and/or no cause of action and dismissing at her cost those portions of plaintiff's petition, as originally filed and as supplemented and amended, insofar as said petition claims that:

1) The following acts were simulated transfers by George W. Delesdernier and/or the community of acquets and gains between Julia Loga, wife of/and George W. Delesdernier to the vendees named therein:

A) Sale of Property by Albert W. Newlin, Admr. of the Succession of Robert M. White and I. B. Rennyson, Auctioneer, to Mark Delesdernier before Harold J. Rayl, Notary Public, dated August 24, 1931, recorded at COB 72, folio 114, Records of Plaquemines Parish, State of Louisiana, conveying the following described property:

Fractional Section or Lot No. 24, T. 18 S., R 16 East, of the Mississippi River.

Fractional Sections 16, 18, 20, 21, 22, 23, 26, 27, 29, T 19 S., R 17 E.; and

Sections or lots 2 and 6, T. 19 S., R. 18 E.

Fractional Sections 21 and 46, T. 20 S., R. 18 E.

Fractional Sections 3, 6, 7, 9, ½ of 10, 11, 12, 35, 40, 41, 43, 45, 48 and 49, in T. 21 S., R. 19 East. Fractional Sections or Lots 1, 3, 5, 7, 10, 11, 12 and 13, 14 in T. 22 S., R. 19 E.; and

Fractional Sections 2, 3, T. 20 S., R. 19, and 8 in T. 21 S., R 31, West of River.

Fractional Sections or lots 7, 8, 9 and 11, in T. 24 S., R. 30 E.

Fractional Sections or lots 20, 21 and 22, in T. 24 S., R. 31 E., and all the land in the rear of Lots 28, 29, 30, 31, 32 and 33, and Sec. 34, in Township 22 S., R. 32 E.

Also a strip of land fronting on Main Pass bounded above by the United States Revenue Station, and below by Williams Pass (land of N. Gatlin not included.) All of said land lying and being situated in the Parish of Plaquemines, State of Louisiana.

Fractional Sections 22, 25 and 26, T. 22 S., R. 20 E. Also Island Head of Passes, in T. 22 S., R 32 E., and East Half of Section 10, and North half of North east quarter of Section 31, and SE ¼ of Section 31, T. 22 S., R. 31 E., West of River. Frl. NW¼ of NE ¼ of SW ¼ and Frl. SE ¼ of Section 21, T 21 So., R. 31 E., W. of River. C.O.B. 57, folio 609.

B) Sale of Property by Albert W. Newlin, Admr. of the Succession of Robert M. White, and I. B. Rennyson, Auctioneer, to Mark Delesdernier,

George O. Delesdernier and Shirley I. Delesdernier before Harold J. Rayl, Notary Public, dated October 29, 1931, recorded at COB 72, folio 106, Records of Plaquemines Parish, State of Louisiana, conveying the following described property:

14. A certain tract of land situated on the left bank of the Mississippi River, and designated as unsurveyed lands on both sides of Scott Bayou rear lots 24 and 26 in T. 24 S., R. 31 E., 40 acres, lots or following sections 1 and 2 in T. 22 S., R. 31 E., Frl. Secs. 13 and 14 and 15 in T. 22 S., R. 31 E., Frl. Secs. 17 to 22, inclusive, in T. 22 S., R 31, Frl. 2, 3, 4, 5, T. 22 S., R. 32 E. Lots 21 to 24 in T. 22 S., R. 32 E., Sec. 24, T. 24, R. 31E and ½ of lots or secs. 10 and 11, and unsurveyed Sea Marsh rear of lots or secs. 51 and 52 in T. 23 S., R. 31 E., undivided 1/3 interest into lots or secs. 8, 9 and 10 in T. 23 S., R 31 E., and 1/3 interest in all of the unsurveyed Sea Marsh W. of lot 1 to 14 fronting on the River Bank of S. W. Pass in T. 23 S., R. 31 E. Undivided ½ interest of the unsurveyed Sea Marsh rear of lots 50, 53, 54 and 55, fronting on the left bank of S. W. Pass, being lots 7, 8, 9 and 12, in T. 23 S., R. 31 E., S.W. of River 1721 acres fresh marsh "B". Island in S. E. Pass, lying in front of Lots 1 to 7 in T. 22 S., R. 33 East, West of River.

C) Sale of Property by Albert W. Newlin, Admr. of the Succession of Robert M. White, and I. B. Rennyson, Auctioneer, to Mark Delesdernier, George O. Deleadernier, and Shirley I. Delesdernier, before Harold J. Rayl, Notary Public,

dated November 14, 1931, recorded at COB 72, folio 110, Records of Plaquemines Parish, State of Louisiana, conveying the following described property:

15. Patent number 5466, dated March 12, 1896, in and to the lands described as all fractional in rear of that part entered by Thomas Bullen of section 13 half in T. 23 S., R. 31 East, in the Southeastern Land District of Louisiana, west of river in the Parish of Plaquemines, containing one hundred and forty (140) and 30/100 acres, more or less. Patent 8426, dated February 6, 1902, in and to lands described as lot or fractional sections 11 and 13, fronting on the West Bank of Southwest Pass, and the east half of west half, and the west half of the east half of fractional section 5, in T. 23 S., R. 31, in the Southeastern district of Louisiana, West of River, Parish of Plaquemines, containing 305.26 acres. Lands described as West half of East half of section eight T. 23 S., R. 31, southeastern District of Louisiana, West of River, containing 170 acres more or less. Patent 5467, dated March 12, 1896, in and to lands described as East half of N. E. ¼ of Sections 19, T. 22 S., R. 31 East, Southeastern district of Louisiana, West of River, containing 80 acres. Patent number 4058, in and to lands described as 3800.40 thirty eight hundred and 40/100 acres, lying in T. 22 S., R. 31 East, Southeastern district of Louisiana, West of River. Patent number 8435, of the State of Louisiana, in and to West half of N. E. ¼ of Section 32, Southeastern district of Louisiana, West of River and under patent

number 8435 in and to W half of S.E. ¼ of Section 32, Southeastern district of Louisiana, West of River, Parish of Plaquemines, both of which are in T. 22 South of range 31, east, Southeastern District of Louisiana, West of River.

2) The Judgments of Possession in the Succession of Mrs. Julia Theresa Loga, Wife of George W. Delesdernier, No. 1043 of this Court, signed on September 26, 1934 and on November 7, 1934, should be declared to be nullities and set aside.

3) The properties included in two certain tax sales from Robert M. White to Mark Delesdernier in the year 1931, recorded in Plaquemines Parish in COB 71, page 411, and in COB 71, page 415, should be deemed to belong to the Successions of Julia Loga Delesdernier and George W. Delesdernier.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant-exceptor, Mark Delesdernier, and against the plaintiff, Gloria Delesdernier Marchand Gerald, maintaining the exceptions of prescription of one year and dismissing at her cost that portion of plaintiff's petition, as originally filed and as supplemented and amended, insofar as said petition claims that plaintiff is entitled to recover damages in the sum of $1,000,000.00, or any other claim that plaintiff might have sounding in tort or for money damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of Court for the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, is

hereby authorized and directed to cancel and erase any and all Notices of lis Pendens filed in connection with this matter, insofar as they relate to any of the matters set forth hereinabove.

JUDGMENT READ, RENDERED AND SIGNED in open Court, this 9th day of September, 1976, at Pointe-a-la-Hache, Louisiana.

s/ EUGENE E. LEON, JR.
JUDGE

APPENDIX B

Opinion of Court of Appeal of Louisiana, Fourth Circuit

Gloria Delesdernier, wife of Paul MARCHAND,
v.
ESTATE of Julia LOGA, wife of George W. Delesdernier, et al., and Delesdernier Estates, Inc.

In the Matter of Succession of George W. DELESDERNIER

In the Matter of Succession of Julia Theresa LOGA, wife of George W. Delesdernier.

Nos. 8665 - 8667.

Court of Appeal of Louisiana, Fourth Circuit

Dec. 13, 1977

Rehearing Denied Jan. 11, 1978

Plaintiff appeals from the dismissal, on exceptions of no cause and no right of action, of her claim to set aside simulated purchases of real property and from a judgment maintaining a plea of prescription of her tort claim for damages arising out of fraudulent succession proceedings and fraudulent sales of succession property. We affirm.

In these consolidated suits, plaintiff, the granddaughter of George W. and Julia Loga Delesdernier, seeks to have brought back into the successions of her deceased grandparents property purchased by George W. as agent for his son, Mark Delesdernier (in one act of sale), and for his children, Mark,

George O. and Shirley Delesdernier (in two acts of sale). According to plaintiff's amended petition, she alleges that George W. "purported to be the agent" for the named children (her uncles and aunt) in the three acts of sale from the succession of Robert M. White "but in truth and in fact he was purchasing for himself and paid the purchase price therefor with his own funds and continued, after the purchase, to exercise ownership ..." and "this purported agency did not exist but was a subterfuge used by the decedent to make disguished donations to his children...." Plaintiff further seeks to have the purported acts of sale "declared to be fraudulent simulated transfers" and the property acquired in those acts to "be deemed to have been property acquired by the community heretofore existing" between Julia and George Delesdernier.

In a second amended petition in these consolidated cases, plaintiff alleges further that George W. in two tax sales from the White succession purported to purchase as agent for Mark Delesdernier when in truth and in fact George W. purchased with his own money the tax sale property. Plaintiff further prays that the property purchased in the two tax sales be brought back into the succession of George W. and Julia, plaintiff's grandparents, and that the property be divided among the heirs including herself.

In an earlier opinion rendered in the Succession of Delesdernier, 184 So.2d 37 (La. App. 4th Cir. 1966), this court, after examination of the pleadings alleging simulation of the same sales sought to be set aside in the consolidated cases now before us, concluded that the allegations of the petition set forth a cause of action on simulation. In the earlier case, we remanded the matter for trial on the merits.

Referring to the earlier opinion, plaintiff contends that

this court examined the allegations of the petition to ascertain if a cause of action had been stated, reversed the trial court's determination maintaining the exception of no cause of action and remanded the matter to the trial court. According to plaintiff, the allegations which this court concluded stated a cause of action, in the earlier opinion, are the same allegations before us at this time. Citing the doctrine of the "law of the case", plaintiff contends that the present panel of this court cannot recede from its earlier judgment finding a cause of action and remanding it for trial. With regard to the exception of no right of action, plaintiff argues that as a legal heir of her grandparents (through representation of her father), she has a right of action in the alleged simulations.

In supplemental brief, she further argues that the court erroneously maintained the exception of one-year prescription for damages resulting from a sale of her interest in her grandparents' successions and from the succession proceedings of her grandparents. In this respect, she contends that only a few months prior to the filing of her petition on October 5, 1960, she had become aware of certain frauds and forgeries including forged signatures on the original petition in the succession of her grandmother filed on May 25, 1934, and on the act of sale executed on February 11, 1935, conveying plaintiff's interest in her grandmother's estate. Under these circumstances, she argues, the trial judge erred in maintaining the exception of one-year prescription for damages resulting from the forgeries.

NO CAUSE OF ACTION

It is well settled that in determining the validity of an exception of no cause of action, the allegations of the petition

are accepted as true and evidence is inadmissible to disprove the allegations. See Babineaux v. Pernie-Bailey Drilling Co., 261 La. 1080, 262 So.2d 328 (1972); American Creosote Company v. Springer, 257 La. 116, 241 So.2d 510 (1970); LSA-C.C.P. art. 931. Where exhibits are made a part of the petition, they are considered in connection with the allegations. Leidenheimer v. Schutten, 194 La. 598, 194 So.32 (1940); American Creosote Company v. Springer, supra. The issue on the exception of no cause of action is whether the petition and attached exhibits present a case legally entitling plaintiff to the redress sought. Hero Lands Company v. Texaco, Inc., 310 So.2d 93 (La. 1975)

When we consider the allegations of the petition and the acts of sale incorporated by reference in the pleadings,[1] we are led to conclude that plaintiff fails to state a cause of action in simulation with regard to these sales. The petition, referring to the acts of sale from the White succession to the children, merely alleges that George W. purportedly acted as agent on behalf of the children, but in fact purchased for himself because no agency existed. It is neither alleged nor contended that the property was conveyed by George W. to the children. George W. did

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1. The five acts of sale are:

   1. Sale of Property by Succession of Robert M. White to Mark Delesdernier, represented by George W. Delesdernier, dated August 24, 1931.
   2. Sale of Property by Succession of Robert M. White to Mark, George O. and Shirley I. Delesdernier, represented by George W. Delesdernier, dated October 29, 1931.
   3. Sale of Property by Succession of Robert M. White to Mark, George O. and Shirley I. Delesdernier, represented by George W. Delesdernier, dated November 14, 1931.
   4. and 5. Two 1931 tax sales of Robert M. White property to Mark Delesdernier.

not purchase as owner. In truth and in fact the purchase was made from the White succession by George W. as agent for the children. George W. appears only as agent. The acts of sale following the adjudication of the property to George W. recite that in confirmation of the adjudication the administrator of the succession conveys the property to the children "represented by George W. Delesdernier". The acts of sale on their face involve transfers of property from the White succession to the children, they are not instruments conveying property owned by George W. to the children. As pointed out by defendant, if no transfer exists from George W. to the children, Mark, George O. and Shirley, there can be no claim of the existence of a simulated transfer from George W. to his children. The property went from Succession of White to the children.

In Eberle v. Eberle, 161 La. 313, 108 So. 549 (1926), cited by defendant, a similar attack was made by a forced heir who alleged that the decedent had caused the property to be put in the name of her daughter when in fact she (the decedent) was the purchaser. In the cited case, the forced heir sought, by means of parol evidence, to recover the property for the succession. The Supreme Court held that LSA-C.C. art. 2239 was inapplicable and that parol evidence could not be used by the forced heir to attack the sale. The court, supra at pages 550-551, stated:

> "The position of plaintiffs is that the act of the deceased, Mrs. Eberle, in causing the property to be put in the name of her daughter, when she was, in fact, the purchaser, was a simulation, and that those of her children, who are plaintiffs herein, have a right to uncover the simulation, under the foregoing article, by means of parol evidence, and to recover

> the property for the succession, in order to protect their rights therein. * * * For a forced heir to avail himself of this article it ought to appear that the property belonged to his ancestor by some title recognized by law, such, for instance, as by act of sale, or by inheritance, or by prescription, and that his ancestor thereafter apparently transferred the property to another, or made some other simulated contract with reference to it. It is the transfer or contract, made by the ancestor, as owner of the property, that his forced heir may attack as simulated, and show the simulation by parol evidence. In other words, a forced heir may attack by parol a transfer made by his ancestor, for the purpose of showing that it was a simulation, in order to bring the property back into his ancestor's succession or to recover it for himself, but he cannot use parol evidence to bring into the succession or to recover property, which under no form of title recognized by law ever belonged to his ancestor or to his ancestor's succession. * * *"

Similarly, in Succession of Hogh, 193 La. 260, 190 So. 399 (1939), a case also involving an attack by a forced heir, the court maintained an exception of no cause of action and stated, supra at page 401:

> "* * * There is no allegation in the plaintiffs' petition that this property belonged to their ancestor by any title recognized by law, viz., by deed, by inheritance or by prescription. There is no allegation that the property was ever transferred by the plaintiffs' ancestor to another. It is the contract or transfer made by the ancestor that forced heirs may attack as a simulation. Under the provisions of Article 2239

> the forced heirs have the right to annul the simulated contract of those from whom they inherit but they could not under this provision of the law establish title to property which under no form of title recognized by law ever belonged to their ancestor or their ancestor's succession. Hoffmann v. Ackermann et al., 110 La. 1070, 1076, 35 So. 293; Malbrough v. Roundtree, 128 La. 39, 54 So. 463; Eberle v. Eberle, 161 La. 313, 108 So. 549; and Scurto v. Le Blanc, 191 La. 136, 184 So. 567."

Considering the Eberle and Hogh cases, we conclude plaintiff has failed to allege a cause of action in simulation in connection with the five acts of sale made subject to these proceedings.

We find no merit to plaintiff's contention that the doctrine of the "law of the case" compels us to overrule the exception of no cause of action. It is true that the earlier opinion of this court, supra at page 52, states:

> "* * * We conclude ... that plaintiff has sufficiently pleaded the issue of simulation, and justice requires that she have her day in court to prove her allegations."

A reading of the opinion, however, indicates that the court was referring to a sale from George W. to Delesdernier Estate, Inc. and other sales from George W. to one or more of his children. The court further states, supra at pages 52-53:

> "We have examined all the pleadings in an attempt to determine as best we can from the repetitious allegations the extent to which simulation has been

> pleaded in regard to various sales or transfers of property, and have set out the pertinent allegations below. There may be others which have escaped our notice. Therefore, the following listing is not necessarily intended to be exclusive, but should be a guide to the trial court when and if the trial on this issue is reached on remand.
>
> "Plaintiff's attack on the ground of simulation is directed at the sale by George W. Delesdernier to Delesdernier Estate, Incorporated, of all his undivided one-half or community interest in the 15 tracts of property described in plaintiff's petition in No. 2767, and also at the following sales or transfers by *him:* [emphasis ours]
>
> [Thereafter follows a listing of the three acts of sale from the White succession to the children and eight other sales purportedly from George W. to one or more of the children.]"

Indeed, in view of the Eberle and Hogh cases cited above, a sale from the father to the children might very well state a cause of action in simulation. The three acts of sale before us, however, though listed in the previous opinion, are sales from the White succession to the children and are not sales by George W. to Mark, George O. and Shirley. Accordingly, the doctrine of the law of the case does not obligate us to overrule the exception of no cause of action with regard to the sales of property from the White succession.

Because plaintiff has failed to state a cause of action in simulation of these five sales, we do not reach the exception of no right of action.

PRESCRIPTION

We find no merit to plaintiff's contention that the trial judge erred in maintaining the plea of one-year prescription to plaintiff's claim in tort for $1,000,000.00 in damages resulting from alleged simulated sales, fraudulent transfers and invalid succession proceedings. In the earlier Fourth Circuit opinion, supra at pages 53-54, the court addressed itself to the same issue and, while in dicta disclaiming to pass on the prescription plea, did in fact conclude that prescription had tolled insofar as this claim for tort damages is concerned.

Assuming, for the sake of argument, that this court did not pass on the prescription plea in the earlier decision, nevertheless, the rationale of the court relating to prescription is applicable in our case. Though the court pointed out, supra at page 54, that plaintiff had negated prescription by alleging in her petition filed in 1958 that "during the last four months [she had] learned" of the fraudulent occurrences the court factually found that in a suit filed in 1951 plaintiff had made the same allegations which serve as the basis for her claim in tort filed in 1958. Under the circumstances, we adopt the conclusion of this court stated supra at page 54:

> "* * * Clearly prescription had long since run against a claim for damages on account of the fraud therein alleged."

Accordingly, we conclude the trial judge properly determined that the prescription of one-year (LSA-C.C. art. 3536) was applicable. The judgment is affirmed.

AFFIRMED

APPENDIX C

Order Denying Certiorari or Writ of Review to Court of Appeal, Fourth Circuit

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

GLORIA DELESDERNIER WIFE OF PAUL MARCHAND — February 17, 1978

V.

ESTATE OF JULIA LOGA, WIFE OF GEORGE W. DELESDERNIER, ET AL AND DELESDERNIER ESTATES, INC. — NO. 61, 482

. . . . . .

In re: Gloria Delesdernier, applying for Certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Plaquemines.

. . . . . .

Denied.

WFM
JWS
FWS
ATJr
JAD
PFC
JLD

A TRUE COPY
Clerk's Office
Supreme Court of La.
New Orleans

February 17, 1978

s/ Frans J. Labranche, Jr.
Frans J. Labranche, Jr.
Deputy Clerk